COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

July 25, 2017

In the Matter of
James J. and Lisa G. McGonigle

OADR Docket No. WET-2015-008
DEP File No. SE 10-2916
Chatham, MA

RECOMMENDED FINAL DECISION ON RECONSIDERATON

INTRODUCTION

James and Lisa McGonigle filed this appeal after the Southeast Regional Office of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") denied their proposal to construct a 108 foot long rock revetment and sacrificial sand cover on a Coastal Beach and along the toe of an eroding Coastal Bank at their property at 498 Shore Road in Chatham, Massachusetts**.** The Department's denial overturned an earlier approval of the proposed Project by the Chatham Conservation Commission. After an evidentiary adjudicatory hearing ("Hearing") at which the parties' respective wetlands experts testified, I issued a Recommended Final Decision ("RFD") that affirmed the Department's denial, finding by a preponderance of the evidence that the McGonigles' proposed project did not meet the performance standards applicable to their project. The Department's Commissioner adopted the RFD in his Final Decision issued on June 9, 2017.

The McGonigles have moved for reconsideration of the Final Decision pursuant to 310 CMR 1.01(14)(d).[1], [2] In their motion, they present two claims of alleged legal error : (1) that I erred in admitting into evidence memoranda authored by Greg Berman and Ted Keon ("the memoranda"), because the memoranda were "unreliable hearsay", and (2) that I erred in applying the term "significant" in 310 CMR 10.30. Both of these arguments were previously raised by the McGonigles at the Hearing and rejected in the RFD and Final Decision. The McGonigles also assert for the first time that the admission of hearsay evidence deprived them of their due process right to cross-examine witnesses. For the reasons below, I recommend that the Department's Commissioner issue a Final Decision on Reconsideration denying the McGonigles' motion for reconsideration.

STANDARD OF REVIEW

A party seeking reconsideration of a Final Decision has a heavy burden of demonstrating that the Final Decision was unjustified. 310 CMR 1.01(14)(d); In the Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision on Reconsideration (November 4, 2014), 2014 MA ENV LEXIS 83, at 6, adopted as Final Decision on Reconsideration (November 7, 2014), 2014 MA ENV LEXIS 82. The party must demonstrate that the Final Decision was based upon a finding of fact or ruling of law that was "clearly erroneous." Id. A Motion for Reconsideration may be summarily denied if "[it] repeats matters

[1] The McGonigles have also filed a Complaint for Judicial Review of the Final Decision in Superior Court pursuant to G.L. c. 30A, § 14. See James & Lisa McGonigle v. Department of Environmental Protection, Civil Docket No. 1772CV00310, filed in Barnstable Superior Court on July 6, 2017. This Recommended Final Decision on Reconsideration and the Department's Final Decision on Reconsideration will be made part of the Administrative Record that will be filed in Superior Court in connection with the McGonigles' Complaint for Judicial Review.

[2] The McGonigles attached to their motion as Exhibit B, an affidavit of James McGonigle dated June 19, 2017. The Department objected to the inclusion of this affidavit in the record after the close of the hearing. Pursuant to 310 CMR 1.01(14)(n)2, the inclusion of this afidavit with the McGonigles' motion was improper and the affidavit should be stricken from the record.

adequately considered in the final decision, renews claims or arguments that were previously raised, considered and denied, or where it attempts to raise new claims or arguments . . . ." Id., at 6-7. Moreover, "reconsideration [of the Final Decision is not] justified by the [party's] disagreement with the result reached in the Final Decision." Id., at 7.

HEARSAY EVIDENCE

The McGonigles assert that it was clearly erroneous to admit the memoranda because they were unreliable hearsay and by admitting the memoranda I deprived the McGonigles of their due process rights to cross-examine witnesses. They argue that none of the indicia of reliability were present. These claims are without merit.

Massachusetts General Laws c. 30A § 11(2) provides that "agencies need not observe the rules of evidence observed by courts [except where otherwise provide by law]. . . . Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." 310 CMR 1.01(13)(h) echoes this rule. Hearsay evidence may be admissible in an adjudicatory hearing. The Supreme Judicial Court has held that "[s]ubstantial evidence may be based on hearsay alone if that hearsay has 'indicia of reliability.'" Covell v. Dep't of Soc. Servs., 439 Mass. 766, 785-86 (2003) (sufficient indicia of reliability was found where the hearsay was detailed and consistent and there was an absence of motive or reason to make false allegations); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 530, 517 N.E.2d 830 (1988) ("Factors to be considered [in determining whether there is sufficient indicia of reliability] include independence or possible bias of the declarant, the type of hearsay materials submitted, whether statements are sworn to, whether statements are contradicted by direct testimony, availability of the declarant, and credibility of the declarant."). See also In the Matter of Franklin Office Park Realty Corp.,

Recommended Final Decision, 2011 MA ENV LEXIS 64 (February 24, 2011), adopted by Final Decision (March 9, 2011). The allowance of reliable hearsay in administrative proceedings is intended to increase their efficiency. Costa v. Fall River Hous. Auth., 453 Mass. 614, 627 (2009).

As the Recommended Final Decision and the Final Decision make clear, I considered the memoranda reliable hearsay based on factors detailed in the Recommended Final Decision. My evaluation of the memoranda led to the conclusion that they should be admitted because they met the indicia of reliability. The memoranda were prepared by persons in their capacities as consultants to the Chatham Conservation Commission; there was no evidence of bias (and none has been asserted); and other expert witnesses who testified at the hearing agreed with and adopted the conclusions Berman and Keon expressed in their memoranda. In my judgment, this evidence was reliable and admissible despite being hearsay. The McGonigles have provided no new arguments for why this evidence should have been excluded.

As for the claim that the admission of this evidence deprived the McGonigles of their due process right to cross-examine witnesses, this claim fails as well. It was clear well before the hearing that the memoranda had been submitted by the Ten Citizens Group as part of their evidence, and witnesses who did file pre-filed testimony on behalf of the Ten Citizens Group and the Department concurred with and adopted the opinions of Berman and Keon. There was no surprise. The McGonigles could have subpoenaed Berman and Keon pursuant to 310 CMR 1.01(12)(g). They did not. They could have cross-examined both Ramsey and Mahala regarding the Berman and Keon opinions which they adopted. They did not. "The principle that hearsay evidence is admissible in administrative proceedings would be vitiated if a party could object to

its admission on the ground that he was denied his [due process right to cross-examination." Beauchamp v. de Abadia, 779 F.2d 773, 775-76 (1st Cir. 1985), quoted in Costa, supra.

Finally, the Motion for Reconsideration mischaracterizes the Recommended Final Decision and the Final Decision as extensively and exclusively relying on or depending on this allegedly unreliable hearsay evidence. While the memoranda factored into the decision, the preponderance of the evidence at the hearing supported the decision, exclusive of the challenged memoranda. This included the testimony of Ramsey and Mahala, as well as the effective cross-examination of the McGonigles' expert, Leslie Fields, by the Department's counsel.

In this case, I found the proffered evidence to be reliable. The McGonigles have not suggested why it is not, other than by asserting that it is unsworn. However, "…consistent with applicable due process requirements, hearsay evidence may form the basis [of an administrative decision] so long as that evidence contains substantial indicia of reliability." Costa v. Fall River Hous. Auth., 453 Mass. 614, 627 (2009).

WHETHER THE SEDIMENT IS "SIGNIFICANT"

The McGonigles claim that the Recommended Final Decision and the Final Decision erred in applying 310 CMR 10.30(3) by ignoring the term "significant." This argument merely repeats the McGonigles' main argument at the Hearing. Primarily, this was their case, and I was not persuaded by their witnesses. For this reason alone, the Motion for Reconsideration should be denied. As the RFD and the Final Decision make clear, the preponderance of the evidence demonstrated that the sediment eroded from the McGonigles' coastal bank plays a role in protecting the statutory interests of storm damage prevention and flood control. The Department's and the Ten Citizen Group's witnesses, as well as the McGonigles' own expert, Fields, testified that the eroded sediment becomes part of the fronting beach, and is transported

both north and south along the beach. There was ample evidence from Ramsey and Mahala that was probative on this issue. I heard and evaluated all of the evidence from all of the parties on the issue of sediment transport and the role this coastal bank plays in protecting the statutory interest. In my judgment the McGonigles did not meet their burden of proving that the coastal bank is not "significant" in protecting the statutory interests.

Because the McGonigles have not met their "heavy burden" on this motion for reconsideration, and for the reasons stated above, I recommend that the Department's Commissioner issue a Final Decision on Reconsideration denying the McGonigles' motion for reconsideration.

Date: 7/25/2017

Jane A Rothchild
Presiding Officer

NOTICE- RECOMMENDED FINAL DECISION ON RECONSIDERATION

This decision is a Recommended Final Decision on Reconsideration of the Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision may be appealed and will contain a notice to that effect.

SERVICE LIST

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Docket No.WET- 2015-008
DEP File No. SE 10-2916

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